

**Before the
Federal Communications Commission FCC 99I-10
Washington, D.C. 20554**

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In re Applications of)	MM Docket No. 87-504
)	
Anchor Broadcasting Limited)	
Partnership)	File No. BPH-860917MD
)	
Galaxy Communications, Inc.)	File No. BPH-860918NY
)	
Susan M. Bechtel)	File No. BPH-860918OV
)	
For Construction Permit)	
For a New FM Station on Channel 250A)	
in Selbyville, Delaware)	

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ORDER

Adopted: May 10, 1999

Released: May 12, 1999

By the Assistant General Counsel, Administrative Law Division:

1. This order identifies the above-captioned applicants as the only qualified bidders eligible to participate in an auction for a construction permit for a new FM station on Channel 250A in Selbyville, Delaware. It refers their applications to the Mass Media Bureau for processing in accordance with the Commission's competitive bidding procedures for mutually exclusive commercial broadcast applications and terminates the hearing proceeding in Docket No. 87-504.

2. The Commission originally granted Anchor's application based upon its superior integration proposal.¹ In *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), the D.C. Circuit reversed the Commission's decision, holding that continued reliance on the integration criterion is arbitrary and capricious and therefore unlawful. On February 25, 1994 the Commission stayed the adjudication of all comparative broadcast cases pending resolution of the questions raised by

¹*Anchor Broadcasting Limited Partnership*, 6 FCC Rcd 721 (1991), *reaffirmed*, 7 FCC Rcd 4566 (1992), *modified*, 8 FCC Rcd 1674 (1993).

the court's decision in this case.²

3. In the Balanced Budget Act of 1997 Congress adopted Section 309(l) expressly providing that the Commission "shall have the authority to conduct a competitive bidding proceeding pursuant to subsection [309](j)" in comparative broadcast cases involving competing applications filed before July 1, 1997, and that if the Commission does conduct a competitive bidding proceeding, it "shall treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding."

4. In implementing Section 309(l) in the *First Report and Order*, the Commission found that the public interest would be best served by using auctions instead of comparative hearings to resolve the frozen comparative cases that are not otherwise settled, and devised special auction procedures for frozen hearing applicants.³ Specifically, the Commission directed the General Counsel to issue an order under delegated authority in hearing cases pending before the Commission that would identify the eligible, qualified bidders entitled to participate in the auction. The Commission stated that the General Counsel should refer all such cases to the Mass Media Bureau for processing in accordance with the Commission's auction procedures, and either terminate or stay the hearing proceeding, depending on whether there were any unresolved hearing issues (including any unresolved petitions to enlarge issues) as to the basic qualifications of any particular applicant.⁴ The hearing proceeding would resume after the auction, the Commission indicated, only if such unresolved qualifying issue(s) involved the auction winner. The Commission also clarified that applicants whose applications had been finally dismissed or denied would not be eligible to participate in the auction but that all applicants remaining in the proceeding would be entitled to participate in the auction without regard to any unresolved hearing issues (or outstanding petitions to enlarge issues) as to their basic qualifications.⁵

5. There has been no settlement agreement among the above-captioned applicants, all of whom filed their applications before July 1, 1997. The permittee for a new FM station on Channel 250A in Selbyville, Delaware will therefore be selected by a system of competitive bidding, pursuant to the Commission's auction procedures for the frozen hearing applicants. All three of the above-captioned applicants are eligible, qualified bidders entitled to participate in this

²*FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994), *modified*, 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 12182 (1995).

³ *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licensees* (MM 97-234) (First Report and Order), 13 FCC Rcd 15920, 15933 ¶ 34, 15952-56 ¶¶ 88-98 (1998), reconsideration denied, FCC 99-74 ¶¶ 7-9, 14-18 (rel. Apr. 20, 1999).

⁴13 FCC Rcd at 15954 ¶ 92.

⁵*Id.* at 15962-63 ¶ 89.

auction, inasmuch as none of their applications has been finally dismissed or denied.⁶ And, of the ten applications originally designated for a comparative hearing in MM Docket 86-504, only the applications filed by Anchor, Galaxy and Bechtel are still pending before the Commission.⁷ As required by Section 309(l), the three pre-July 1, 1997 pending applicants are the only qualified bidders eligible to compete in the auction. The date of the auction, as well as the deadline for filing the mandatory short-form application,⁸ will be announced by a Public Notice issued under delegated authority by the Wireless Telecommunications Bureau and the Mass Media Bureau. By that Public Notice, the Bureaus will also seek comment on a variety of auction-specific procedural issues concerning the day-to-day conduct of the auction for the construction permit for FM Channel 250A (Selbyville, Delaware).

6. It is appropriate, moreover, to terminate the hearing proceeding based on the record in this case. The Commission granted Anchor's application because it determined that Galaxy and Bechtel were comparatively inferior to Anchor, and the Commission's comparative analysis was the only issue before the court. Additionally, there are no pending unresolved petitions to enlarge issues relating to the basic qualifications of Anchor, Bechtel or Galaxy. In these circumstances, there is no outstanding question that would require that the Commission resume the hearing proceeding after the auction. The hearing proceeding is therefore terminated. Any new matters (including a settlement agreement) regarding these applications, whether raised before or after the auction, should be presented directly to the Mass Media Bureau for resolution in accordance with the procedures for mutually exclusive applications for new FM broadcast stations.

7. ACCORDINGLY, IT IS ORDERED That, pursuant to delegated authority, as provided in the *First Report and Order*, 13 FCC Rcd at 15954-55 ¶ 94, the hearing proceeding in Docket MM 87-504 IS TERMINATED and the following applications ARE REFERRED to the Mass Media Bureau for processing in accordance with the Commission's competitive bidding procedures for mutually exclusive commercial broadcast applications: (a) Anchor Broadcasting

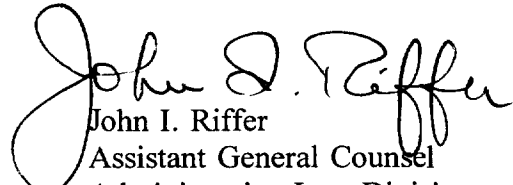
⁶Bechtel had asked the court to direct the Commission to dismiss the application of Galaxy Communications. The court declined to do so, however, concluding that "[w]hich applicants the Commission should consider on remand (other than Bechtel) . . . is a question for the Commission to decide in the first instance." 10 F.3d at 887. Thereafter, the Commission denied a joint motion to dismiss filed by Bechtel and Anchor. *Anchor Broadcasting Limited Partnership*. 10 FCC Rcd 663 (1995).

⁷Four applicants prosecuted their applications through a decision by the Commission. *Anchor Broadcasting Limited Partnership*, 6 FCC Rcd 721 (1991). The fourth applicant, Selbyville Broadcasting Company, however, did not file a court appeal of the Commission's denial of its application and therefore the denial of its application is final.

⁸In order to participate in the auction, pending applicants must file short-form applications indicating their intention to compete in the auction. *First Report and Order*, 13 FCC Rcd at 15950 ¶ 82.

Limited Partnership (File No. BPH-860917MD); (b) Galaxy Communications, Inc. (File No. BPH-860918NY); and (c) Susan M. Bechtel (File No. BPH-860918OV); and that Anchor Broadcasting Limited Partnership, Galaxy Communications, Inc. and Susan M. Bechtel ARE IDENTIFIED as the only qualified bidders, eligible to participate in the auction for a construction permit for a new FM station on Channel 250A for Selbyville, Delaware.

FEDERAL COMMUNICATIONS COMMISSION



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